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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 79-362

FRANK HALL,
Petitioner

vs.

CARL PETTIJOHN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Opinion Below

The opinion of the Court of Appeals is reported at 599 F.2d 476 (A. 1). The opinion of the District Court is reproduced in the Appendix hereto (A. 14). The opinion of the Supreme Judicial Court of Massachusetts is reported at Mass. Adv. Sh. (1977) 1480 (A. 16). The opinion of the Appeals Court of Massachusetts is reported at Mass. App. Ct. Adv. Sh. (1976) 860 (A. 24).

Jurisdiction

The judgment of the court below was entered on June 7, 1979. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Generally, where, for purposes of review by way of habeas corpus, state rules of evidence end and the Sixth Amendment begins.

2. Specifically, whether a defendant's constitutional right to present a defense is violated by the exclusion of evidence that on the day after a robbery a witness selected someone else's photograph as being that of the robber even though he ultimately picked out the defendant's photograph and would have made an in-court identification of the defendant.

Constitutional Provisions

"In all criminal prosecutions, the accused shall enjoy the right. . .to have compulsory process for obtaining witnesses in his favor. . . ."

STATEMENT OF THE CASE

A. Prior Proceedings

On September 25, 1975, Carl Pettijohn was indicted by the Suffolk County Grand Jury for armed robbery (No. 94505). After a trial before a judge and a jury, he was found guilty and sentenced to a term of twelve to fifteen years at M.C.I. Walpole. That conviction was affirmed by both the Massachusetts Appeals Court, Commonwealth v. Pettijohn, Mass. App. Ct. Adv. Sh. (1976) 860, and, upon further appellate review, by the Supreme Judicial Court of Massachusetts, Commonwealth v. Pettijohn, Mass. Adv. Sh. (1977) 1480.

In August of 1977, a petition for writ of habeas corpus was filed in the United States District Court where the case was considered on the state court record and transcript. On June 5, 1978, the Magistrate recommended that the petition be denied. On June 11, 1978, Chief Judge Caffrey so ordered. On August 25, 1978, Chief Judge Caffrey denied Pettijohn's Motion For Certificate Of Probable Cause. However, on October 2, 1978, the First Circuit granted the Certificate and on June 7, 1979, ordered that the writ issue "unless the Commonwealth of Massachusetts makes arrangements for a new trial within ninety days" or applies for a writ of certiorari. The government's petition for a rehearing was denied.

B. Statement of The Facts

The issue before this Court relates to the exclusion by the trial judge of the testimony of one Frank Griffin. As

summarized by the Supreme Judicial Court (pages 1482-1484 of its Opinion):

> The testimony of Griffin, as presented at the pre-trial hearing of the defendant's motion to suppress, was as follows. Griffin, an employee of the New England Wholesale Drug Co., testified that on September 8, 1975, he observed a man take a gun from David Smith, a security guard for New England Wholesale Drug Co. The next morning, September 9, Officer Ivanoski showed a group of photographs marked 1A to 1G as exhibits. Griffin pointed to one of the photographs and said, "I think it's him," referring to 1A, and the police officer said, "No, it's not," and Griffin said, "It's definitely that one," referring to 1G (the defendant's photograph), and the policeman said, "That's him."

The defendant was known to the witness for several weeks prior to the robbery in September. Griffin testified that beginning in the middle of August, he had seen the defendant pass along the street once or twice each day. Griffin had, on occasion, spoken with the defendant and called him by the name of "Bunny". The defendant in turn referred to Griffin as "Big Al". Griffin had on several occasions observed the defendant "hanging around" in the vicinity of 22 Angel Street, and thought he lived there. Griffin, on being asked by the judge whether if he had not seen the photographs he could identify the defendant, answered he thought he could.

The two photographs, 1A and 1G, selected by Griffin depict two different persons of strikingly similar appearance. The judge,

after studying the array which was shown to the witnesses, and referring specifically to 1A and 1G stated: "They are remarkably similar."

The judge found as fact that the police officer's statement to Griffin was suggestive, and allowed the defendant's motion to suppress Griffin's identification testimony at the trial. At the trial in chief the Commonwealth called as witnesses Smith and Officer Ivanoski, the same persons who had testified during the pre-trial hearing on the motion to suppress. . .Smith identified the defendant as the person who robbed him of his gun with a gun; he identified the defendant from photographs, and he stated that he had seen the defendant on prior occasions. Officer Ivanoski testified as to the defendant's identification by Smith. On

cross-examination, the judge excluded questions concerning Griffin's identification from the photographs, and accepted as an offer of proof Griffin's and Officer Ivanoski's testimony during the hearing on the motion to suppress.

After the Commonwealth rested, the judge called a conference. Counsel for the defendant indicated that intended to call Griffin as a defense witness. The judge ordered that he not be called, based on counsel's representation that he intended to bring out facts substantially the same as Griffin's testimony during the hearing on the motion to suppress, and accepted Griffin's testimony during that hearing to be the defendant's offer of proof. The defendant rested and the jury returned their verdict of guilty.

Reasons For Granting The Writ

This case should not have been very significant. In essence, it concerned a matter of state evidentiary law. The trial judge saw it that way, a three judge panel of the Massachusetts Appeals Court saw it that way, a five judge panel of the Massachusetts Supreme Judicial Court saw it that way, the United States Magistrate saw it that way, and the Chief Judge of the District Court saw it that way. By disagreeing with these eleven members of the judiciary who previously ruled on the matter, the First Circuit literally and figuratively made a "federal case" out of Carl Pettijohn's conviction. It is that action which makes this case a significant one for it raises the much broader question of when the exclusion of evidence is a matter of state evidentiary law and when such exclusion implicates a Sixth Amendment right to present a defense.

The evidence excluded in the case at bar was the testimony given by Frank

Griffin at a pre-trial hearing (Tr. 81).[1/]

Griffin was an eye witness to the robbery. After the robbery, but before any photographic identification, Griffin told the police that the assailant was an individual he knew by the name of "Bunny".[2/] As set out above, the day after

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[1/] Notwithstanding the First Circuit's introductory assertion, this case does not concern "the scope of the Sixth Amendment right to call a witness in one's defense after having moved to suppress a portion of that witness' testimony." The Supreme Judicial Court assumed without deciding that a defendant was not barred from calling a witness because of a prior motion to suppress. See Commonwealth v. Pettijohn, supra at 1486 (A. 22).

[2/] The First Circuit termed this assertion as to the sequence of events as "a rather strained interpretation of the record" (p.3 of its Opinion). The police officer testified that someone mentioned the name

the robbery, Griffin was shown a group of photographs. "Griffin pointed to one of the photographs and said, 'I think it's him,' referring to 1A, and the police officer said, 'No, it's not,' and Griffin said, 'It's definitely that one,' referring to 1G (the defendant's photograph), and the policeman said, 'That's him.'" Commonwealth v. Pettijohn, supra at 1482-1483 (A. 18-19).

Footnote No. 2 continued.

"Bunny" to him before the photographs were shown although he did not know whether it was Griffin or the victim (Tr. 38). Griffin testified that he told the police he knew the robber as Bunny although it was not clear when he said this (Tr. 17). The victim testified that he had "no idea what [the] name [of the robber] was" (Tr. 25). It does not seem to be straining to conclude that it had to be Griffin who mentioned the name Bunny to the police before any photographic identification.

The two photographs were "remarkably similar" (Tr. 40). Upon Pettijohn's motion, Griffin's identification testimony was suppressed in view of the suggestive police procedures. However, Pettijohn then sought to introduce it as part of his defense.

It is straining to say that Griffin identified a person other than Pettijohn as the perpetrator of the crime. Rather, he briefly mistook a photograph of someone else as being that of Pettijohn whom he knew and whom he had previously identified to the police. At best, Griffin's confusion in selecting the photos was relevant to the weight to be given his identification of Pettijohn.

The evidence was excluded because under Massachusetts Law, such evidence must have probative value that someone other than the defendant actually committed the crime. Commmonwealth v. Murphy, 282 Mass. 593, 597 (1933). The same is true as a matter of

federal evidentiary law. Holt v. United States, 342 F.2d 163, 165 (5th Cir. 1975); United States v. Hallman, 439 F.2d 603, 605 (D.C. Cir. 1971). The evidence in dispute here did not have such probative value.[3/]

To the contrary, Griffin's testimony as a whole - and it was all of his testimony that was sought to be admitted (Tr. 81) - tended to prove that Pettijohn committed the crime. Griffin would have testified that the robber fled in the direction of the house in which Pettijohn lived (Tr. 15, 17). He would have testified that while he initially identified a photograph of somebody else ("I think it's him"), he ultimately picked out Pettijohn's photograph ("It's definitely that one")

3/ The First Circuit did not question the determination by the state courts, the United States Magistrate and the District Court judged that the excluded evidence was not relevant as impeachment of the victim's testimony.

(Tr. 13). He would have made an in court identification of Pettijohn (Tr. 9-10).

The First Circuit pointed to two second circuit cases [United States v. Robinson, 544 F.2d 110, 112-113 (2nd Cir. 1976) and Grant v. Alldredge, 498 F.2d 376, 379 (2nd Cir. 1974)] to support its position that the excluded evidence was "relevant and material to Pettijohn's defense" (p. 8 of its Opinion). The petitioner agrees that those cases are instructive in this case - but by way of contrast. Both involved evidence beyond a mere photographic identification that another person may be the guilty party. In Robinson, there was evidence that the bank robber, alleged to be the defendant, resembled another individual suspected of two armed robberies that had recently occurred in the general area. In Grant, a bank teller was shown nine photographs which included that of the defendant and one Walsh. Walsh was selected but not the defendant. Walsh was connected by other evidence to the robbery.

In addition, his physique approximated the robber's and the defendant's did not.

Thus, in both Grant and Robinson, there was evidence which arguably indicated that someone other than the defendant committed the crime. There was some reason to believe that maybe an injustice was done. However, even in those cases, there was no indication that the Sixth Amendment's right to present witnesses in one's defense was implicated.

The First Circuit also relied on the decisions of this Court in Washington v. Texas, 388 U.S. 14 (1967) and Chambers v. Mississippi, 410 U.S. 284 (1973). However, as noted in Washington, supra at 16, 23, nothing in the Sixth Amendment compels the admission of irrelevant and immaterial testimony. Moreover, in Chambers, supra at 302-303, this Court stated that its holding did not "signal any dimunition in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures."

If the Sixth Amendment is implicated in this case, then it must be implicated in every case where evidence offered by a defendant is excluded. And if the Sixth Amendment is implicated in this case, then the holding of the First Circuit signals a marked expansion in the scope of review by way of federal habeas corpus. Every issue becomes a constitutional issue merely by labelling it so, and tacking on the appropriate amendment. A federal court should not so easily be transformed into merely another appellate court reviewing again a state court conviction.

Finally, even if cases like Chambers and Washington were found to be applicable to the case at bar, the question arises as to what is the appropriate standard of review. The First Circuit would assert that Pettijohn had the right to present Griffin as a witness "[n]o matter how credible this defense" would have been (p. 13 of its Opinion). The petitioner argued in the court below and asserts here that the appropriate standard would be whether

the defense was "'less persuasive' to such a degree that [the court] must conclude that [the defendant's] right to a fair trial was violated." Maness v. Wainwright, 512 F.2d 88, 91 (5th Cir. 1975), writ of certiorari dismissed as improvidently granted, 430 U.S. 950 (1977). As argued above, if anything, Pettijohn's defense was more persuasive without the excluded evidence.

Furthermore, adoption of the Maness standard would also assure that habeas corpus relief is granted to prevent an injustice and not to allow a defendant to reap a windfall - that "the Sixth Amendment is a shield to protect the defendant and not a sword which he may use to thwart justice." United States v. Tchack, 296 F. Supp. 500, 502 (S.D.N.Y. 1969).

CONCLUSION

For the reasons stated above, it is respectfully submitted that the questions

presented for consideration are substantial and that the court below has so far departed from the accepted and usual course of judicial review that a petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 78-1420

CARL PETTIJOHN,
PETITIONER, APPELLANT,
v.
FRANK HALL,
RESPONDENT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. ANDREW A. CAFFREY, *U.S. District Judge*]

Before
COFFIN, *Chief Judge*,
BOWNES, *Circuit Judge*,
PETTINE, *District Judge*.*

Jack A. Goetz, Boston University Law Student, with whom *John Leubsdorf*, Associate Professor of Law, Court appointed counsel, and *Judd H. Lees*, Boston University Law Student, were on brief, for appellant.
Robert V. Greco, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, and *Stephen R. Delinsky*, Assistant Attorney General, Chief, Criminal Bureau, were on brief for appellee.

June 7, 1979

PETTINE, *District Judge*. This habeas corpus appeal concerns the scope of the sixth amendment right to call a witness in one's defense after having moved to suppress a portion of that witness' testimony.

* Of the District of Rhode Island, sitting by designation.

A brief recitation of the facts is necessary. Carl Pettijohn was convicted of armed robbery in Massachusetts Superior Court solely on the basis of the victim's eyewitness testimony. David Smith, the victim, had been a security guard for the New England Wholesale Drug Company for approximately two weeks. On the afternoon of September 8, 1975, Smith was walking through the company parking lot and responded to the beckoning of a man he later identified as Pettijohn. He was somewhat familiar with Pettijohn, having seen him in the neighborhood a few times. When Smith drew near, the man identified as Pettijohn exposed two handguns stuffed in his pants. Simultaneously a second man appeared at Smith's right, threatening Smith and ordering him to cooperate. Pettijohn then removed Smith's weapons and told Smith that he would be released only if he forgot his assailant's face.

The next morning, Smith picked out a picture of Pettijohn from a group of nine police photographs and identified him as the robber.

Frank Griffin, the manager of the drug company was also an eyewitness to the robbery, which he observed from the first floor window of the Company's building some forty feet away. He immediately ran to get his gun, and by the time he had rushed out of the building to aid Smith, Smith was returning and Griffin could see only the backs of the fleeing robbers.

Griffin, who had worked at the company longer than Smith, was familiar with Pettijohn and the other boys living in the neighborhood. In fact, Griffin knew Pettijohn by his nickname "Bunny", while Pettijohn called Griffin "Big Al".

The next morning, the police also showed Griffin a group of nine photographs. Again a picture of Pettijohn was amongst the photographs. The police had inserted the pic-

ture because Pettijohn fit the various descriptions of the robber. The police officer had also heard Smith or Griffin mention Pettijohn's name. At some point, Griffin told the police officer that he knew the culprit by the name of "Bunny", but the record provides no clue as to whether he did this before or after inspecting the photographs. The government asserts that Griffin positively identified Pettijohn as the robber prior to his review of the photographs. However, this is a rather strained interpretation of the record in light of Griffin's questionable ability to independently identify Pettijohn at a later suppression hearing.

Despite this confusion in the record, there is no doubt that Griffin encountered serious difficulty when he attempted to identify the robber from the set of nine police photographs. Griffin narrowed the selection down to what the trial judge later described as two "remarkably similar" photographs: one was a photograph of Pettijohn, the other a photo of another man. Griffin selected the picture of the other man and stated, "I think that's him". The police officer replied, "No it's not". Not surprisingly, Griffin then selected the remaining photograph which depicted Pettijohn and stated, "It's definitely that one". The police officer confirmed this second choice with the words, "That's him".

Prior to trial, the defendant moved to suppress the photographic identifications of both Smith and Griffin. At the suppression hearing, Griffin expressed some doubt as to whether he could independently identify Pettijohn as the robber without relying upon the previous photographic display. Before Griffin was excused from the suppression hearing, Pettijohn's lawyer requested that Griffin be available "as a possible defense witness during the course of the trial". The trial judge ruled that Griffin's eventual identification of Pettijohn was inadmissible due to the

impermissibly suggestive police tactics. Any in-court identification by Griffin of Pettijohn was also considered tainted by the police practices and, thus, declared inadmissible. The trial judge declined to suppress Smith's identification.

At trial the prosecution rested solely upon Smith's identification of Pettijohn. In an effort to counter Smith's damaging identification, the defense sought to call Griffin as a witness and introduce his prior identification of another man. The court ruled against these efforts, finding that Griffin's testimony was irrelevant and inadmissible for the purpose of impeaching Smith's identification. Counsel then stated that impeachment was not the only purpose of the testimony; he also wished to call Griffin "as a witness for the defendant for the purpose of showing his identification of a person other than the defendant". After being rebuffed by the judge, counsel again attempted to clarify his offer of proof by stating that, "I would call Griffin for the purposes of the defendant's right to present evidence in his defense. . . ." The court reiterated its ruling that the testimony was "inadmissible because it's not material and not relevant."

On appeal, Pettijohn argued that he had a right to waive his success on the motion to suppress and that, under the sixth amendment right to present "witnesses to establish a defense", as articulated in *Washington* v. *Texas,* 388 U.S. 14, 19 (1967), he was constitutionally entitled to call Griffin to show that Pettijohn was not the robber. The appeals court held that the trial judge did not abuse his discretion because

> it was clear from the testimony given by Smith and Griffin at the hearing on the motion to suppress . . . that there were substantial differences between the respective opportunities of the two witnesses to observe and recollect the facial characteristics of the robber. *Contrast Commonwealth* v. *Franklin,* 318 N.E. 2d 469 (1974).

Commonwealth v. *Pettijohn,* 351 N.E. 2d 535 (Mass. App. Ct. 1976).

In evaluating the relevancy of Griffin's tetimony by contrasting it to Smith's, the Appeals Court apparently was only concerned with whether Griffin's testimony was sufficiently relevant and reliable to impeach Smith's testimony. The Appeals Court's focus upon the issue of impeachment is displayed by their citation of *Commonwealth* v. *Franklin, supra,* a case involving impeachment of a government witness.

The Massachusetts Supreme Judicial Court also upheld the evidentiary exclusion; again, the issue of relevancy was addressed solely in relation to impeachment:

> In essence, the defendant asserts the right to impeach the witness Smith by showing that the witness Griffin was mistaken in his first attempt to select a picture of the person known to him as "Bunny". We fail to see the relevance of Griffin's mistake on the issue of Smith's credibility or reliability. In these circumstances, the judge was clearly warranted in ruling, as he impliedly did, that the testimony of Griffin had little, if any, probative force for the defense. Nor do we agree that there was any Federal constitutional right under the Sixth Amendment, as argued by the defendant, to present evidence which was not probative, and hence not relevant. *Cf. Washington* v. *Texas,* 388 U.S. 14, 16-23, 87 S.Ct. 1920, 18 L.Ed 2d 1019 (1967).
>
> *Commonwealth* v. *Franklin,* 366 Mass. 284, 318 N.E. 2d 469 (1974), relied on by the defendant is distinguishable. . . . .

Commonwealth v. *Pettijohn,* 364 N.E. 2d 1970, 1073-74 (1977).

This analysis failed to consider the issue of the defendant's right to introduce a witness in his own defense; *i.e.,* using

Griffin's testimony to establish that another man was the robber and was identified as such by an eyewitness. The relevance of this affirmative evidence was never addressed.

In the last paragraph of the opinion, the Massachusetts Supreme Judicial Court apparently did acknowledge that defendant wished to introduce the witness not solely for impeachment purposes but also "as part of his [the defendant's] case".[1] The court, however, felt that introduction by the defendant of evidence previously suppressed might produce "a tactical advantage unfair to the Commonwealth" that could not be overcome with special jury instruction. *Commonwealth* v. *Pettijohn, supra,* at 1974.

Defendant's brief supporting his habeas corpus petition in federal district court was no paradigm of clarity, but it did reassert that a dominant purpose for Griffin's testimony was to raise "a feasible defense that the jury should have had an opportunity to consider".

In the federal court, Magistrate Cohen, who originally considered the petition, stated that evidence of Griffin's initial identification "was proffered solely for the purpose of impeaching Smith". He recognized that the Massachusetts Supreme Judicial Court had ruled such testimony irrelevant for the purpose of impeachment. Having framed the issue in this fashion, the Magistrate could easily find that the constitutional right to present evidence in a defendant's behalf "is limited to evidence which is '*relevant* and *material* to the defense'. *Washington* v. *Texas,* 388 U.S. 14, 23 (1967) (footnote omitted) (emphasis added)." He concluded that the exculsion of irrelevant matter was not constitutional error.

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[1] The court assumed without deciding that the defendant could waive his right to suppress the evidence. *Commonwealth* v. *Pettijohn,* 364 N.E. 2d 1970, 1073 (1977). This assumption was fully warranted. *See* note 3 *infra.*

Chief Judge Caffrey adopted the recommendation of the Magistrate and concluded:

> it is settled law in any event that the admission or rejection of evidence normally does not raise a question of constitutional dimension cognizable in a federal habeas corpus. This is true *a fortiori* where that type of evidence has been ruled immaterial under state law, and such is the case herein.

As a matter of abstract constitutional doctrine, Judge Caffrey's holding cannot be doubted. There is a critical fault in this analysis, however, as it applies to this case. The state court's ruling of relevancy focused on impeachment, not upon the use of the evidence to present a direct defense upon one's behalf.

The state courts never considered the relevancy of Griffin's testimony as it related to raising the direct defense that another man, with remarkably similar characteristics, committed the crime. It is elementary that the purpose for which the evidence is offered is often determinative of its relevancy. So it is in this case.

As the Massachusetts courts held, Griffin's first allegedly mistaken selection of a picture had little bearing upon Smith's credibility or reliability. In terms of impeachment, Griffin's change of mind is logically connected with the reliability of his own identification, not Smith's. Therefore, for the purpose of impeachment, Griffin's testimony was irrelevant.

In contrast, Griffin's testimony was clearly relevant for the purpose of direct testimony to establish a defense. Pettijohn desired to establish a sound defense by introducing evidence supporting an alternative rendition of the facts. Griffin's testimony concerning his initial identification was critically relevant for this task. Griffin knew Pettijohn well enough to exchange nicknames upon meeting and had the opportunity to observe the robbery from

forty feet. Pettijohn wished to show that, despite this familiarity and opportunity to observe, Griffin identified another man as the culprit before the police practiced admittedly suggestive tactics. Even if the record is interpreted as showing that Griffin thought he initially had seen Pettijohn in the parking lot, his choice of someone else's photograph is strong evidence that his initial identification was incorrect and that some other person was in fact the robber. The Supreme Court has recognized the importance of such exculpatory evidence:

> Selection of the picture of a person other than the accused . . . will be useful to the defense in precisely the same manner that the selection of a picture of the defendant would be useful to the prosecution.

United States v. *Ash*, 413 U.S. 300, 318-19 (1973). *See also Grant* v. *Alldredge*, 498 F.2d 376, 379 (2d Cir. 1974). Such exculpatory evidence gains importance in the context of this case. Besides the victim, Griffin was the only eyewitness to the crime. The central issue was one of identification. Evidence that someone other than the defendant was identified as the criminal is not only probative but critical to the issue of the defendant's guilt. *See, e.g.*, *United States* v. *Robinson*, 544 F.2d 110, 112-13 (2d Cir. 1976); *Commonwealth* v. *Graziano*, 368 Mass. 325, 329-30 (1975). The prior identification could not have been more relevant and material to Pettijohn's defense; he could support his version of the event in no other way. In the context of a criminal trial, the sixth amendment severely restricts a trial judge's discretion to reject such relevant evidence.[2] Exclusion of relevant exculpatory evidence in-

[2] We are particularly free in this case to review the trial judge's evidentiary ruling because our decision does not contradict the basis upon which the judge made his disretionary decision. During the pressures of the trial the judge apparently made his evidentiary ruling solely in terms of the relevancy of the testimony for impeachment purposes. The various appellate courts also framed the evidentiary issue in this fashion and overlooked the sixth amendment right to present witnesses in one's own defense. Therefore, we are not treading on a state trial judge's discretion; rather, we are reaching an issue clearly preserved on the record, yet bypassed by the trial and appellate courts.

fringes upon the fundamental right of an accused to present witnesses in his own defense. The right of compulsory process in state courts is well established:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. *Texas*, 388 U.S. 14, 19 (1967). This right gains special importance when the evidence is critical to the accused's defense. *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973).

Once a sixth amendment right is implicated, the state must offer a sufficiently compelling purpose to justify the practice. Various state evidentiary rules which advanced legitimate state interests have bowed to the defendant's right to let the jury hear relevant evidence. *See, e.g.*, *Washington* v. *Texas, supra* (state interest in avoiding perjured testimony did not justify its rule barring co-conspirators from testifying); *Chambers* v. *Mississippi, supra* (state law excluding third party hearsay confessions did not justify exclusion). *Cf. Davis* v. *Alaska*, 415 U.S. 308 (1974) (confrontation right prevails over juvenile proceedings privilege statute); *United States* v. *Nixon*, 418 U.S. 683, 709 (1974) (executive privilege yields to need for criminal evidence). The reasons offered for exclusion in this case are likewise insufficient.

None of the purposes offered by the Commonwealth of Massachusetts justify the infringement upon Pettijohn's right of compulsory process. A rational juror might well consider Griffin's first identification unreliable in light of his subsequent retraction. If the Supreme Court case of *Washington* v. *Texas, supra,* and *Chambers* v. *Mississippi, supra,* mean anything, it is that a judge cannot keep important yet possibly unreliable evidence from the jury. In addition, Griffin's testimony does reveal charcteristics of reliability. Griffin observed the crime from a relatively close and protected area, and his first photographic identification was made free of any suggestive police practices. Griffin's later repudiation of the initial identification might affect the weight of the evidence but not its admissibility. This later change of heart hardly makes the initial identifcation patently unreliable. A juror could well decide that the subsequent repudiation was due to suggestive police practices and, thus, less reliable than the first identification.

Once a defendant attempts to introduce testimony that is intimately interrelated with previously suppressed testimony, the defendant waives his objections to the introduction of that related evidence. *See Lawn* v. *United States,* 355 U.S. 339 (1958); *United States* v. *Carter,* 422 F.2d 519 (1970). Therefore, a jury receives a full and balanced rendition of the facts because the prosecution is able to introduce the subsequent retraction and identification on cross-examination.[3] Because neither identification was patently unreliable, the jury can weigh the subsequent recantation, the remarkably similar photographs, and the circumstances surrounding Griffin's observation of the crime and then decide which identification was the more accurate. Determining which identification was correct was the open question at the heart of petitioner's defense. In a criminal trial, the jury must be presented with this question and allowed to answer it.

[3] The petitioner readily concedes that the exercise of his right to introduce Griffin's testimony waives his rights in suppressing Griffin's other identifications. Without such rebutting evidence, the jury might be unduly influenced by Griffin's initial photographic identification. Massachusetts recognizes such a waiver: "The defendant lost the benefit of the earlier order suppressing evidence of the events of that evening by insisting that his counsel question him about those events." *Commonwealth* v. *Redmond,* 357 Mass. 333, 341 (1970).

This conclusion is supported by Massachusetts practice. Massachusetts allows an out-of-court identification, which is later recanted, to constitute the basis of a criminal conviction. *Commonwealth* v. *Vitello,* 381 N.E. 2d 582, 599 (1978). If a recanted identification is sufficiently reliable for prosecutorial use, the state cannot claim that it is too unreliable when offered by the defendant. A core purpose of the sixth amendment is that the defendant has the same rights to introduce evidence as the prosecution. 8 Wigmore, Evidence sec. 2191 (McNaughton rev. 1961). Justice Harlan's words are particularly relevant:

> This is . . . a case in which the State has recognized as relevant and competent the testimony of this type of witness, but has arbitrarily barred its use by the defendant. This, I think, the Due Process Clause forbids.

Washington v. *Texas,* 388 U.S. at 25 (concurring).

The Massachusetts Supreme Judicial Court noted that introduction of the evidence would provide the defendant with an "unfair tactical advantage". The court apparently felt that allowing the defendant to introduce the initial identification and placing the government in a rebutting role would unfairly prejudice the government. Conceivably jurors might conclude that the government had withheld this line of questioning from their own case due to its damaging nature. We find this reasoning unpersuasive. The creation of any unfair inference in the jurors' minds

appears very speculative. During cross-examination, the government could fully develop Griffin's repudiation and second identification. Despite the contentions of the Massachusetts Supreme Judicial Court, a judge could construct a jury instruction which fully explained why the evidence was introduced in that order. Even if a tactical disadvantage was created, the government cannot complain for it was government misconduct that prohibited their direct introduction of Griffin's testimony. A contrary result would turn the exclusionary rule on its figurative head; the accused, not the prosecution, would be prohibited from producing a witness and penalized for police misconduct.

Allowing the defendant to introduce the first identification and permitting the government to rebut with previously suppressed evidence did result in some circuitous inefficiency. The circular scenario of suppression, waiver of suppression, and eventual introduction of the tainted testimony would have been avoided had defendant initially never moved to suppress the evidence. The motion to suppress, however, should not be construed as a waiver of defendant's sixth amendment right of compulsory process.

There is no evidence that the defendant, through his counsel, chose to waive the right to compulsory process. On the contrary, the defendant clearly expressed his desire not to waive his sixth amendment right to call Griffin. Before the motion to suppress was acted upon, the defendant indicated to the judge that he might call Griffin as a defense witness.

This conditional request was totally proper and understandable considering the dilemma Pettijohn faced. He had moved to suppress the testimony of both eye-witnesses. When the testimony of only one witness was suppressed, Pettijohn was in need of the now-suppressed witness to counteract the victim's admissible testimony. Recognizing this situation, the defendant's timely request to call Griffin in his own defense was the most feasible method of preserving his sixth amendment right.

The defendant had not waived his right to elicit such a relevant and vital testimony in his defense. The exclusion of such testimony prohibited the defendant from presenting witnesses in his favor.

Despite appellee's failure to argue the issue in any detail, we have considered the applicability of harmless error doctrine to this case. While it may be possible that erroneous exclusion of a defendant's evidence could be harmless beyond a reasonable doubt, *Chapman* v. *California,* 386 U.S. 18 (1967), we do not think this is such a case. In a case where identification of the robber was the key issue, exclusion of such identification testimony was necessarily harmful error. Pettijohn could only support his assertion that another man was the culprit by introducing Griffin's testimony. Showing the jury that an eyewitness identified another man as the robber when confronted with photographs would have created a plausible defense. The jury could find either that Griffin truly did observe a different individual commit the crime or that Griffin's differing identifications revealed how unreliable any identification of Pettijohn was. Either of the two theories derived from Griffin's identification of another man as the culprit could have significantly swayed a jury charged with finding guilt beyond a reasonable doubt. The right to present such a vital witness as Griffin is, at heart, the right to present a defense. No matter how credible this defense, our system of justice guarantees the right to present it and be judged by it.

The writ of habeas corpus shall issue unless the Commonwealth of Massachusetts makes arrangements for a new trial within 90 days.

Adm. Office, U.S. Courts — Blanchard Press, Inc., Boston, Mass.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CARL PETTIJOHN,
Petitioner

v. CIVIL ACTION
NO. 77-2233-C

FRANK HALL,
Respondent

MEMORANDUM

July 11, 1978

CAFFREY, Ch. J.

This is a petition for a writ of habeas corpus. The matter came before the Court on petitioner's objection to the Magistrate's report and recommendation that the petition be dismissed.

Petitioner's objections have been argued by counsel, and, after hearing, I rule that the recommendation of the Magistrate should be adopted as the order of this Court. A review of the pertinent papers establishes that petitioner does not claim that any issue of fact needs resolution in this Court and that it is appropriate for the petition for habeas corpus to be decided on the basis of the state court record.

A review of that record establishes, as the Magistrate correctly points out, that the only issue relied on by petitioner is an evidentiary ruling excluding certain evidence which the trial court, the Appeals Court, and the Supreme Judicial Court labelled as irrelevant. On the record these rulings seem eminently correct, and it is settled law in any event that the admission or rejection of

evidence normally does not raise a question of constitutional dimension cognizable in a federal habeas corpus. This is true a fortiori where that type of evidence has been ruled immaterial under state law, and such is the case herein. See Commonwealth v. Murphy, 282 Mass. 593, 597 (1933). See also Chambers v. Mississippi, 410 U.S. 284, 302-303 (1973); Lisenba v. California, 314 U.S. 219, 229 (1941); Nelson v. Moriarty, 484 F.2d 1034, 1036 (1st Cir. 1973).

Accordingly an Order will enter dismissing the petition for a writ of habeas corpus.

Andrew A. Caffrey, Ch. J.

COMMONWEALTH vs. CARL Z. PETTIJOHN.

Suffolk. March 7, 1977. - July 6, 1977.

Present: Hennessey, C.J., Braucher, Wilkins, Liacos, & Abrams, JJ.

Identification. Evidence, Judicial discretion, Collateral matter, Identification.

Indictment found and returned in the Superior Court on September 25, 1975.

The case was tried before Roy, J.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Maurice F. Ford for the defendant.
John A. Kiernan, Assistant District Attorney, for the Commonwealth.

HENNESSEY, C.J. This is an appeal under the provisions of G. L. c. 278, §§ 33A-33G, from a conviction on a charge of armed robbery, after a jury trial in the Superior Court. Before the trial the judge denied the defendant's motion to suppress the testimony of the witness David Smith, and the defendant excepted. The judge allowed the motion to suppress as it applied to the testimony of the witness Frank Griffin.

During the trial, and after the Commonwealth rested, the trial judge ruled that the defendant could not call as a defense witness Frank Griffin, whose testimony had previously been suppressed on the defendant's motion.

The defendant's conviction was affirmed on appeal by the Appeals

Court, Mass. App. Ct. (1976),[a] and this court granted the defendant's application for further review.

The defendant argues two issues before this court: that the judge was in error in permitting before the jury the identification of the defendant by the witness Smith, and that the judge was also in error in excluding the testimony of the witness Griffin, as proffered by the defendant. We conclude that there was no error. We reach this conclusion on substantially the same reasoning applied by the Appeals Court, as more fully expounded in this opinion.

1. We turn first to the issue whether there was error in the judge's denial of the defendant's motion to suppress the identification testimony of the witness Smith. Clearly there was no error.

We summarize the contested testimony of Smith as it was presented at the hearing on the motion to suppress. Smith testified that at 3:30 P.M., September 8, 1975, while on duty as a security guard for New England Wholesale Drug Co. in Dorchester, he was robbed of his weapons; that the next morning he was shown photographs at New England Wholesale Drug Co., including a photograph marked 1G which he identified as the picture of the person who robbed him; that he saw other photographs at the police station before that and 1G was not among them but he did not know if the other photographs marked as exhibits were among the photographs he was shown at the police station or later at the New England Wholesale Drug Co., but they resembled them; that he knew the defendant's face as he was from the neighborhood, and that he did not recall if a photograph marked 1A was among the photographs shown him by the police on

[a] Mass. App. Ct. Adv. Sh. (1976) 860.

the morning of September 9, 1975.[1]

Boston police Officer Ivanoski testified that on September 9 he showed Smith nine photographs and Smith had selected 1G.

There was no showing that the photo identification process was in any way suggestive as it related to the witness Smith. The judge was correct in his ruling denying the motion to suppress. Commonwealth v. Botelho, Mass. , - (1976).[b] [2] Commonwealth v. Underwood, Mass. App. Ct. , - (1975).[c] Simmons v. United States, 390 U.S. 377 (1968).

2. We turn now to the exclusion by the judge of Griffin's testimony. The testimony of Griffin, as presented at the pre-trial hearing of the defendant's motion to suppress, was as follows. Griffin, an employee of the New England Wholesale Drug Co., testified that on September 8, 1975, he observed a man take a gun from David Smith, a security guard for New England Wholesale Drug Co. The next morning, September 9, Officer Ivanoski showed a group of photographs marked 1A to 1[illegible] as exhibits. Griffin pointed to one of the photographs and said, "I think it's him," referring to 1A.

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[1] The emphasis on 1A and 1G in the examination of Smith, particularly as compared to the testimony of the witness Griffin, is as follows: 1G was the picture of the defendant; 1A was a photograph of a man mistakenly identified by Griffin as the defendant. Smith, however, made no misidentification of any kind during the whole procedure.

[b] Mass. Adv. Sh. (1976) 652, 661-662.

[2] The record discloses that the confrontation between Smith and the robber was face to face and took a couple of minutes; the victim's opportunity to observe was extensive. The identification could be called a "reliable" one. Nevertheless, since there was no suggestive pre-trial procedure by the police, we need not consider the problem raised in the Botelho case at - (Mass. Adv. Sh. [1976] at 661-671).

[c] Mass. App. Ct. Adv. Sh. (1975) 1215, 1235-1236.

and the police officer said, "No, it's not," and Griffin said, "It's definitely that one," referring to 1G (the defendant's photograph), and the policeman said, "That's him."

The defendant was known to the witness for several weeks prior to the robbery in September. Griffin testified that beginning in the middle of August, he had seen the defendant pass along the street once or twice each day. Griffin had, on occasion, spoken with the defendant and called him by the name of "Bunny." The defendant in turn referred to Griffin as "Big Al." Griffin had on several occasions observed the defendant "hanging around" in the vicinity of 22 Angel Street, and thought he lived there. Griffin, on being asked by the judge whether if he had not seen the photographs he could identify the defendant, answered he thought he could.

The two photographs, 1A and 1G, selected by Griffin depict two different persons of strikingly similar appearance. The judge, after studying the array which was shown to the witnesses, and referring specifically to 1A and 1G, stated: "They are remarkably similar."

The judge found as fact that the police officer's statement to Griffin was suggestive, and allowed the defendant's motion to suppress Griffin's identification testimony at the trial. At the trial in chief the Commonwealth called as witnesses Smith and Officer Ivanoski, the same persons who had testified during the pre-trial hearing on the motion to suppress, and they testified in substance as they had during the hearing. Smith identified the defendant as the person who robbed him of his gun with a gun; he identified the defendant from photographs, and he stated he had seen the defendant on prior occasions.

Officer Ivanoski testified as to the defendant's identification by Smith. On cross-examination, the judge excluded questions concerning Griffin's identification from the photographs, and accepted as an offer of proof Griffin's and Officer Ivanoski's testimony during the hearing on the motion to suppress.

After the Commonwealth rested, the judge called a conference. Counsel for the defendant indicated he intended to call Griffin as a defense witness. The judge ordered that he not be called, based on counsel's representation that he intended to bring out facts substantially the same as Griffin's testimony during the hearing on the motion to suppress, and accepted Griffin's testimony during that hearing to be the defendant's offer of proof. The defendant rested and the jury returned their verdict of guilty.

In our view the exclusion of Griffin's testimony was within the judge's discretion. The trial judge has broad power in determining relevancy, and the extent to which evidence of collateral matters will be admitted has traditionally rested within his discretion. Commonwealth v. West, 312 Mass. 438, 440 (1942). Commonwealth v. Hunt, 4 Gray 421, 423 (1855). "While the defendants are entitled to reasonable latitude in developing inconsistencies in a witness' testimony, the extent to which collateral matters shall be explored is in the discretion of the judge." Commonwealth v. Doherty, 353 Mass. 197, 213-214, cert. denied, 390 U.S. 982 (1967).

In essence, the defendant asserts the right to impeach the witness Smith by showing that the witness Griffin was mistaken in his first attempt to select a picture of the person known to him as "Bunny." We fail to see the relevance of Griffin's mistake on the

issue of Smith's credibility or reliability. In these circumstances the judge was clearly warranted in ruling, as he impliedly did, that the testimony of Griffin had little, if any, probative force for the defense. Nor do we agree that there was any Federal constitutional right under the Sixth Amendment, as argued by the defendant, to present evidence which was not probative, and hence not relevant. Cf. Washington v. Texas, 388 U.S. 14, 16-23 (1967).

Commonwealth v. Franklin, 366 Mass. 284 (1974), relied on by the defendant, is distinguishable. In Franklin, two victims having identical opportunities to observe their assailants under identical conditions at first made positive identifications of both Franklin and another man, including an encounter at a juvenile proceeding. However, on the day of trial, both victims recanted their identifications of the second defendant, and the trial proceeded against Franklin alone. On cross-examination of the victims by defense counsel, questions relating to the mistaken identification were excluded. In reversing the defendant's conviction this court stated at 289, "The record does not indicate that either victim had a better opportunity to observe the defendant than the other assailant. On the contrary, there is every indication that the opportunity of the victims to observe and thus identify the two criminals was substantially the same as to both criminals. In so far as the record discloses, every factor which made it possible for the victims to identify one of the two criminals, or to be mistaken as to the identity of one, applied equally to the other criminal. Therefore, those factors which caused the victims mistakenly to identify one participant would be relevant in assessing the reliability of the

identification of the defendant. We emphasize the significant fact that the mistaken identification had been made under oath."

The decision in Franklin, based as it was on the special circumstances of that case, is not apposite here. Most important, the witness Griffin in the instant case, unlike the witnesses in the Franklin case, was prepared to make an in-court identification of the defendant as the robber. In the instant case, also unlike Franklin, there were significant differences between the respective opportunities of the two witnesses to observe and recollect the facial characteristics of the robber. It was to "usual" cases like the instant one that we had reference when we said in Franklin at 290-291: "We have no intention here of setting new and restrictive perimeters to the trial judge's usual discretionary control over the limits of . . . [examination on collateral matters]."

We assume without deciding that the defendant is correct in his premise that, having prevailed on the motion to suppress as to the testimony of Griffin, the defendant was privileged to make a timely waiver of his rights as to the entire suppression issue. This privilege, however, is not controlling over the judge's right to exclude evidence as not probative, and hence not relevant. We have in mind, also, that the defendant was claiming the privilege of presenting as part of his case a witness whose testimony (unknown to the jury) had been excluded, on motion of the defense, when offered by the Commonwealth. In exercising his discretion, when the witness was offered by the defendant, the judge could properly consider that a tactical advantage unfair to the Commonwealth might accrue to the defendant if Griffin were allowed to testify, an unfairness which

might be difficult or impossible to overcome with special instructions to the jury.

Judgment of the Superior Court affirmed.

COMMONWEALTH vs. CARL Z. PETTIJOHN.

July 20, 1976.

1. The defendant's sole argument concerning Smith's selection of the photograph of the defendant from among the nine photographs shown him by Officer Ivanoski is groundless. The evidence at the hearing on the motion to suppress did not warrant a finding that Smith had previously seen any of the other eight photographs during the course of his earlier perusal of "mugbooks" at the police station. There was a failure of proof on that point. See Commonwealth v. Botelho, Mass. , - (1976)[a], Commonwealth v. Underwood, Mass. App. Ct. , - (1975).[b] Accordingly, there was no occasion for the judge to make a separate determination of the admissibility of Smith's proposed in-court identification of the defendant as the person who had robbed him. Commonwealth v. Mobley, Mass. , - (1976).[c] Commonwealth v. Kostka, Mass. , - (1976).[d] 2. The judge did not abuse his discretion in refusing to allow the defendant (a) to cross-examine Ivanoski as to whether Griffin had initially identified a photograph of someone other than the defendant as being a likeness of the robber or (b) to call Griffin to testify to the same effect. As the judge observed, it was clear from the testimony given by Smith and Griffin at the hearing on the motion to suppress (which was allowed as to Griffin) that there were substantial differences between the respective opportunities of the two witnesses to observe and recollect the facial characteristics of the robber. Contrast Commonwealth v. Franklin, Mass. , - , - (1974).[e] In view of our conclusion on this point we do not consider whether either of the refusals could also be supported on any of the other grounds given by the judge.

Judgment affirmed.

Maurice P. Ford for the defendant.
John A. Kiernan, Assistant District Attorney, for the Commonwealth.

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[a] Mass. Adv. Sh. (1976) 652, 661-662.

[b] Mass. App. Ct. Adv. Sh. (1975) 1215, 1235-1236.

[c] Mass. Adv. Sh. (1976) 717, 723-724.

[d] Mass. Adv. Sh. (1976) 1608, 1618-1619.

[e] Mass. Adv. Sh. (1974) 1483, 1484-1485, 1486-1489.